

STATE OF MICHIGAN
COURT OF APPEALS

CHESTER WOLFENBARGER and JANE
WOLFENBARGER,

UNPUBLISHED
April 11, 2006

Plaintiffs-Appellees,

v

LAKESIDE MALL, L.L.C.,

No. 264149
Macomb Circuit Court
LC No. 04-003649-NO

Defendant-Appellant.

Before: Smolenski, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Defendant appeals by leave granted a circuit court order denying its motion for summary disposition pursuant to MCR 2.116(C)(10) in this premises liability case involving a slip on ice on a concrete sidewalk near an entrance to a mall. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

On December 18, 2002, at approximately 7:30 a.m., plaintiff¹ dropped his wife off near a store entrance at the mall and then parked his car in the parking lot. The parking lot was wet. There was no precipitation at that time, and he did not recall any snow or snow banks in the parking lot. He estimated that the temperature was 29 or 30 degrees. He did not see any ice when he dropped his wife off, or in either the parking lot or on any part of the sidewalk before he fell. He parked approximately a few hundred feet from where he fell. He did not stumble or slip before he got to the sidewalk. When he reached the concrete walkway, he walked up and fell to his left side. Regarding the visibility of the condition, plaintiff testified as follows:

Q. Now, how do you know it was ice that caused you to fall?

A. I could see it after I fell.

Q. You didn't see the ice before you fell?

¹ This opinion uses the singular "plaintiff" to refer to plaintiff Chester Wolfenbarger. The loss of consortium claim raised by Jane Wolfenbarger is derivative in nature.

A. No, sir.

Q. But you saw the ice after you fell?

A. I was laying in it, yes.

Q. If you had looked down at the ground before you fell, immediately before you fell, would you have been able to see that ice?

A. I don't believe so.

Q. Why not?

A. It just looked wet.

Plaintiff estimated that the ice was six by ten feet, "solid" and "probably thicker than a thin skim of ice." After the fall, and as plaintiff was being loaded into an ambulance, plaintiff Jane Wolfenbarger saw another woman fall in the area.

In support of its motion for summary disposition, defendant presented the testimony of two of its security personnel. Lieutenant Patch described his routine of checking the mall entrances before the mall opens. He checked the conditions outside the doors and spent five to six minutes outside each door. The parties did not dispute that Patch worked on the day in question. Another security officer, Jason Corrie, testified that after plaintiff's fall, he checked the sidewalk where plaintiff said he fell. "From what I remember it was just wet. I don't remember any ice or slush." However, the incident report, which lists Corrie as the reporting officer, states under the heading "Officer's Observation," "Observed ice on the handicap ramp and the sidewalk."

In its motion for summary disposition, defendant argued that the condition was open and obvious. At the hearing on defendant's motion, the trial court questioned defense counsel about why Lt. Patch did not see the ice. Counsel responded that he did not see it because it was not there when he inspected. The trial court denied defendant's motion for summary disposition, concluding that there was a question of fact whether the icy condition was open and obvious.

Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law."

Invitors are not absolute insurers of the safety of their invitees. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). "In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). The duty generally does not encompass warning about or removing open and obvious dangers unless the premises owner should anticipate that special aspects of the condition make even an open and obvious risk unreasonably dangerous. *Id.* at 517. Whether a hazardous condition is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger and risk presented

upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). The determination depends on the characteristics of a reasonably prudent person, not on the characteristics of a particular plaintiff. See *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329 n 10; 683 NW2d 573 (2004).

The open and obvious danger doctrine applies to the accumulation of snow and ice:

[I]n the context of an accumulation of snow and ice, *Lugo* means that, when such an accumulation is “open and obvious,” a premises possessor must “take reasonable measures within a reasonable period of time after the accumulation of snow and ice to diminish the hazard of injury to [plaintiff]” only if there is some “special aspect” that makes such accumulation “unreasonably dangerous.” [*Id.* at 332.]

This Court and our Supreme Court have applied the open and obvious doctrine to falls involving snow-covered ice, even where the injured party claimed not to have known that there was ice beneath the snow. In some decisions, the plaintiff was aware of the slippery conditions. See, e.g., *Joyce v Rubin*, 249 Mich App 231, 239-240; 642 NW2d 360 (2002); *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 5; 649 NW2d 392 (2002). In some of these cases where the doctrine is applied, the fact that the plaintiff observed other individuals slipping is mentioned in conjunction with whether the plaintiff was or should have been aware of the slippery conditions. See *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 120 (Griffin, J. dissenting); 689 NW2d 737 (2004), rev’d for the reasons stated in the dissenting opinion 472 Mich 929 (2005); *McKim v Forward Lodging, Inc*, 266 Mich App 373, 387; 702 NW2d 181 (2005), rev’d 474 Mich 947 (2005). In other decisions, this Court has applied the doctrine to snow-covered ice even in the absence of the plaintiff’s knowledge of the existence of the ice beneath the snow or observations of people having difficulty with the conditions. See, e.g., *Teufel v Watkins*, 267 Mich App 425, 428; 705 NW2d 164 (2005). The reasoning in these cases is that when a reasonably prudent person with ordinary intelligence observes snow, that person should anticipate that the snow might conceal ice.

In the present case, there was no snow on the ground that would alert a reasonably prudent person of a slippery condition. Although the condition of the ground was obviously wet, the danger and risk presented by wet concrete is not the same as that presented by icy concrete. As explained in *Novotney, supra* at 474, the logic underlying the open and obvious doctrine is that “where the very condition that may cause injury is wholly revealed by casual observation, the duty to warn serves no purpose.” We are not persuaded that the apparent wetness of the concrete wholly revealed the condition and its danger as a matter of law such that a warning would have served no purpose. Moreover, we agree with the trial court that the evidence that Patch routinely examined the area and did not observe the condition during his inspection shows that there is a question of fact regarding whether an average person of ordinary intelligence would have been able to discover the danger and risk upon casual inspection.

For these reasons, we affirm the trial court's denial of defendant's motion for summary disposition.

Affirmed.

/s/ Michael R. Smolenski

/s/ Donald S. Owens

/s/ Pat M. Donofrio